SUPREME COURT, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 1310

PAUL WASHINGTON KIBBY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

CHARLES R. STEWART,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

CARL McFADDEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI.

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CONSOLIDATED PETITION FOR WRIT OF CERTIORARI.

Your petitioners, Paul Washington Kibby, Charles R. Stewart, and Carl McFadden, in this consolidated case, respectfully pray this Court for the issuance of a Writ

of Certiorari to the United States Court of Appeals for the Eighth Circuit, to review the judgments entered in these three consolidated cases, above entitled, as consolidated by said Court and entered on the 20th day of February, 1967, and which judgments appear in the Appendix hereto as Exhibits on pages 27-29.

Upon timely application, this Court granted an Order on the 16th day of March, 1967, granting an extension of time within which to petition for Certiorari, in the following terms: "Upon Consideration of the application of counsel for petitioners, It Is Ordered that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby extended to and including April 21, 1967" (See Appendix).

OPINIONS AND JUDGMENTS BELOW.

The initial judgments in these cases were the judgments of the United States District Court (No. 1) for the Eastern District of Missouri, Eastern Division, wherein the Court sentenced the petitioners to be committed to the custody of the Attorney General for a period of twenty years each, as entered on the 3rd day of June, 1966, after having been found "guilty" by the Court on May 23rd, 1966, of two counts or more each, as set out in the Exhibit "A" in the Appendix (pages 21-26).

All of these three cases were tried on the same day, and the Appeals timely filed were consolidated in the Court of Appeals for the Eighth Circuit and upon the filing of Briefs and after hearing arguments, the United States Court of Appeals for the Eighth Circuit entered its Decision and Opinion on the 20th day of February, 1966, which Opinion is found in the Appendix as Exhibit "C", beginning on page 30 and ending on page 38 (Not yet reported in the Federal Reporter).

It is this decision and Opinion which the Petitioners respectfully pray to be reviewed and set aside so that the Petitioners may be afforded the right to have the Trial Court consider whether they had been the victims of a legal entrapment by the Government Agents or not.

GROUNDS FOR INVOKING JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code.

(a) The Court of Appeals for the Eighth Circuit has in these three cases rendered a Decision and Opinion contrary to and in conflict with Opinions and principles previously announced by other United States Courts of Appeals on the same matters as those involved in and decided in the case at bar.

(b) The Court of Appeals for the Eighth Circuit has herein considered an important question of national concern, which has been considered by the Courts of Appeals in at least six circuits rendering decisions diametrically opposed to each other and not heretofore settled by this Court, but which should be settled on a national basis to provide a single rule of law applicable to and to be followed by all the circuits consistently instead of having different rules for the several geographical areas in the several circuits.

On these grounds as more fully amplified below your petitioners respectfully ground their prayers for the Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

STATUTES CONFERRING JURISDICTION TO REVIEW.

Title 28, United States Code, Section 1254 (1):

§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree—§ 1254 (1), Title 28, U. S. C.

STATUTES INVOLVED IN THESE CASES.

Title 26, U. S. C., § 4704 (a), Packages:

It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26, U. S. C., § 4705 (a), Order Forms:

General Requirement—It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given on a form to be issued in blank for that purpose by the Secretary or his delegate.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

(1) Is a defendant legally entitled to rely upon the defense of "entrapment" without admitting the substantive act charged?

(2) Is a defendant deprived of his constitutional right against self-incrimination if he must first admit or give evidence that he has committed the substantive act charged, in order to advance the defense of "entrapment"?

STATEMENT OF THE CASES.

Foreword:

The petition presents questions concerning entrapment by federal officers, a problem which has troubled the conscience of the Court on other occasions.

This is a consolidated petition concerning three defendants, tried on the same day, but in two trials. In the District Court the cases carried two separate numbers.[1] In the Court of Appeals all three were consolidated into one case with three numbers assigned.[2]

Two defendants, Kibby and Stewart were charged in one Indictment of eight Counts, alleging violation of Sections 4704 (a) and 4705 (a) of Title 26, U. S. C.

Count 1 charged defendant Kibby with a violation of unlawful purchase of a narcotic under Section 4704 (a) and unlawful sale on September 28, 1965 of the same portion of narcotics under Section 4705 (a). In fact, as is

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[1] McFadden in Number 66 Cr. 61 (1); Kibby and Stewart in Number 66 Cr. 58 (1).

[2] Kibby No. 18,445; Stewart No. 18,446; McFadden No. 18,447.

usual in this type of case, the evidence of a sale was presented to satisfy both counts, since a showing of possession (in the sale) satisfies proof of unlawful purchase under Congressional fiat.

Counts 3 and 4 pertain to defendant Kibby also, and charges the unlawful purchase and unlawful sale of a quantity of narcotics on December 1, 1965, again involving one transaction.

Counts 5 and 6 charged the defendant Stewart with unlawful purchase and unlawful sale of a quantity of narcotics in one transaction on March 22, 1966.

Counts 7 and 8 named both defendants, Kibby and Stewart jointly with unlawful purchase and unlawful sale of narcotics in one transaction on April 1, 1966. These latter two counts were dismissed by the Trial Court on grounds that the United States Attorney failed to supply proper answers to questions propounded in a request for a Bill of Particulars, as directed to do so by the Court.

The third defendant, Carl McFadden was charged in a separate Indictment of four Counts. The first two being with violations of Sections 4704 (a) and 4705 (a), Title 26, U. S. C., alleging unlawful purchase and sale of a quantity of narcotics, again involving one transaction, on November 15, 1965, and the next two Counts charging similar violations in a transaction on November 27, 1965.

These cases are related because they involved the same government witnesses; the transactions took place in the same premises; the cases were tried on the same day, before the same judge, and Motions and Arguments before the District Court and in the Court of Appeals were made applicable to all three defendants at the same time. Not only are the same principles of law involved but the same principals, appear in the cases of all three defendants. There is only one Opinion rendered by the Court of

Appeals, and only one Writ of Certiorari would be required to issue (Rules Supreme Court, 23 (5)).

The defendants each pleaded, "Not Guilty" to their Indictments and were tried by the Court upon "waiver" of a jury, before the Honorable Roy W. Harper, Chief Judge of the District Court for the Eastern District of Missouri, Eastern Division, on the 23rd of May, 1966 and the defendants were sentenced on the 3rd day of June 1966 to twenty years each after Motions for Dismissal or in the alternative for a New Trial as to each defendant were overruled.

Circumstances of the occurrences:

The evidence presented against the three defendants was essentially the same with the same witnesses appearing to testify for the Government in each transaction and against each defendant. The only change was one of locale, and this was involved in Counts 7 and 8, but these were dismissed by the Trial Court. We are left with the two transactions pertaining to defendant Kibby, one transaction pertaining to defendant Stewart, and two transactions pertaining to defendant McFadden. All five transactions took place at the home or apartment of one Dudley Brown.

In all these transactions, Dudley Brown, an Agent Provocateur for the Government, acted as a "buyer" under the direction and orders of the regular Treasury Agents assigned to the Narcotics Bureau.

Dudley Brown was well known to the local Treasury Agents and to persons in the community as an addict to narcotics and as a convicted felon and thief, for a long time before and while he served these Narcotic Agents as a provocateur to induce victims to be apprehended as violators of Narcotic Laws in the presence of Treasury Agents.

Dudley Brown was himself indicted on charges of violating Narcotic Laws under Title 26, as a result of evidence secured by the Agents directly, but this Indictment was suppressed after it was secured, although the United States Officers knew where he was at all times, and could have served and executed it at any time they desired. Brown knew it was issued and understood he had been arrested as a result of it, but released without bond by the Federal authorities when he agreed to work for them to induce others to produce or appear to produce narcotics for him in the presence of the Treasury Agents so they could make some "easy" cases and secure many convictions for the record books.

Dudley Brown was indicted in September, 1965, before he arranged the first of the transactions involving these defendants. In the nine months following his own Indictment, he was able to provide the Treasury Agents with at least nine "friends" whom he induced to violate the narcotic laws in the presence of the Agents, in addition to the three defendants here. He was a wholesale Agent Provocateur who expected to be rewarded for his victims, and he was. The Indictment against him was first, suppressed, and later was dismissed, also the Agents helped him have the bond in the State Assault and Robbery case reduced, and he was furnished with money and weapons. All this while he continued to be an addict, supplying himself with narcotics, either with or without the knowledge and help of the Treasury Agents.

Upon orders from the Treasury Agents, and with the money supplied by the Agents, Brown called each of the defendants, initiated transactions to take place in his home, in the living room, while Agent Patch was hiding in the adjoining bedroom, peeking and observing the prearranged violations. The Agent had placed Government Advanced Funds on the coffee table in the living room,

after monitoring a telephone conversation in which Brown solicited the persons he had called to deliver narcotics to his home. The Agent testified he saw the defendants each come into Brown's living room, take the money and leave narcotics on the table.

Brown testified that he had been friendly with the defendants for a long time, that he solicited them to supply him with narcotics, and they did so in his home in the presence of the Treasury Agent, Patch, who was supplying him with funds for this purpose. He admitted that he was an addict taking drugs during the time he was involved in these Treasury arranged transactions. He also admitted that he committed other crimes during the period between the date of his federal indictment and the appearance in court to testify in these cases, and that he had received assistance from the Treasury Agents in having his State bond reduced, and otherwise.

Here we have a classic example of the Government Agents creating an Agent Provocateur out of the dregs of a drug-addict under Indictment by them. A convicted felon who at the time he is a "special employee" of the stately United States Treasury Department, is out committing unrelated crimes with weapons supplied by the Government Agents. The Government here not only was manufacturing crimes for prosecution by them, but actually was instrumental in manufacturing additional crimes by their own Frankenstein. This is the agency used to entrap others into committing violations in the presence of the Treasury Agents merely to be apprehended by them for prosecution.

At the close of the Government's case the defendants advanced the defense of "entrapment" and moved for Dismissal, but this was "overruled." The District Court disregarded the defense of entrapment, apparently on the grounds advanced by the United States Attorney prosecut-

ing these cases, that the defendants could not be entitled to such a defense, because they had not admitted the substantive acts of the transactions. As the Court put it in his rejection:

> "Normally in entrapment they admit that they do the act, don't they? . . . because these people denied that they sold them."

The Motions were "Overruled," and the defendants sentenced to two ten year terms to run consecutively, making a total for each defendant of twenty years incarceration.

In due course, these three cases were appealed to the United States Court of Appeals for the Eighth Circuit and that court consolidated the three cases and in one Opinion "Affirmed" the convictions of each. The Court of Appeals refused to consider the defense of entrapment on the same grounds as that advanced by the United States Attorney in the District Court, viz.: that the defendants had not admitted the substantive acts in the transactions involved in the indictments and charges.

REASONS FOR GRANTING THE WRIT.

(1)

The Decision and Opinion of the Court of Appeals for the Eighth Circuit is in conflict with the decisions and opinions of other Circuit Courts of Appeals, and admits this in the Opinion.

The decision here by the Court of Appeals is in direct conflict with decisions rendered by Circuit Courts of Appeals in three other circuits as well as the Supreme Court. This conflict is in respect to the question as to whether a defendant must first admit the substantive act involved in a transaction induced by a government agent before he is entitled to have the court consider the defense of

"entrapment" in his favor. The Court of Appeals here in its Opinion (set out in the Appendix) says:

> "In this Appeal, defendants' sole argument is that they were legally entitled to rely upon the defense of entrapment without first admitting the substantive act charged. They have made a plausible argument and presented respectable authority for their position."

But this Court rejected those plausible arguments and the respectable authorities and said further:

> ". . . An extended review of the cases holding both ways on that issue could lead to the conclusion that entrapment should be available only when the acts constituting the commission of the crime charged are admitted."[3]

While the government agents conceded that they sponsored all the phone calls between Brown and the defendants, and that Brown initiated all the negotiations for the purchase of the narcotics, they did not show that any of the defendants had other or more narcotics than the amounts requested by Brown, their own agent. Brown was under duress because he was under Indictment and there was coercion by the Government Agents to have Brown produce violators in the presence of the Treasury Agents. They permitted him to say in court that he expected to have his work brought to the attention of the officials of the Government to his advantage.

In this case the Government's own evidence shows they initiated all of the purchases and sales, and the case presents the question as to whether, at the close of the Government's case, the Court found as a matter of law a submissible case of "entrapment" and the Court should have announced this in a specific ruling. The Govern-

[3] See page 34 of Opinion in Appendix.

ment then, could have put on evidence to prove, if it could, that the defendants were ready and willing to sell narcotics to anyone, but here the Court failed to do so, but ruled without considering the defense of entrapment. When the defendants moved for a Dismissal on the grounds of entrapment, the Court said: "Overruled."

The Supreme Court in a recent case involving an undercover agent said:

> ". . . He is indeed often the instigator of, and active participant in the crime—an agent provocateur. Of course, when solicitation by the concealed government agent goes so far as to amount to entrapment, the prosecution fails."
>
> **Osborn v. United States, 87 S. Ct. 439, 440 (1966).**

We believe that the Court of Appeals for the Eighth Circuit has overlooked the statement in the opinion of the United States Supreme Court in one of the earliest cases dealing with entrapment. In the case of **Sorrells v. United States, 53 S. Ct. 210, 216, 287 U. S. 435, 452,** the Court says:

> "The Government considers the defense as analogous to a plea of pardon or of autrefois convict or autrefois acquit. It is assumed that the accused is not denying his guilt but is setting up special facts in bar upon which he relies regardless of his guilt, or innocence of the crime charged. This, as we have seen, is a misconception. The defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct."

We submit that this language clearly conflicts with the announced rule followed by the Court of Appeals in

the Eighth Circuit in this case particularly when it says that it is adopting the

> ". . . conclusion that entrapment should be available only when the acts constituting the commission of the crime charged are admitted."[4]

This rule of law is in direct conflict with the rule on the same question being followed in the Circuit Courts of the District of Columbia,[5] 1st Cir.,[6] 5th Cir.,[7] 9th Cir.[8] and this ruling is in conflict with the rule announced by the United States Supreme Court in the case of **Sherman v. United States, 78 S. Ct. 819, 356 U. S. 369,** where the court said:

> "We conclude from the evidence that entrapment was established as a matter of law. In so holding we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling Kalchinian, who was the Government's own witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses."

So in the Sherman case, there was no admission by the defendant of the substantive act. Albeit there was no denial either. In our case the District Court refused to consider the question of "entrapment" at the close of the Government's case, but reserved ruling on the matter until after the close of the entire case, forcing the defendants to testify, waiting to see if they would

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[4] See page 34 of Opinion in Appendix.

[5] Hansford v. United States, 303 F. 2d 219;

[6] Henderson v. United States, 237 F. 2d 169; Gorin v. United States, 313 F. 2d 641;

[7] Sears v. United States, 343 F. 2d 139;

[8] Banks v. United States, 249 F. 2d 672.

admit the substantive acts, and when they did not, he refused to consider the question of entrapment. This action on the part of the Trial Court was in error and prejudicial to the defendants, and this Court should require a new trial with instructions to the Trial Court to consider at the close of the Government's case, if there is a submissible issue of entrapment, and if there is, then permit the Government to submit proof that the defendants were ready and willing without persuasion to sell to any ready buyer.

The Trial Court did not make a direct ruling on the issue of "entrapment", indicating that it failed to even consider it, as noted in the Opinion of the Court of Appeals (page 34).

> ". . . We are unable to determine from this general finding whether the Trial Court ruled as a matter of law that the defendants were not entitled to raise the defense of entrapment or, as a matter of fact, decided that there was no entrapment."

It is unfortunate that we do not have a definite statement from the Trial Court on this issue, but we do have an expression from it which gives us a clue as to the Court's thinking. This leads us directly to the assumption that he refused to even consider the issue or defense of entrapment, on the ground of the failure of the defendants to admit the substantive acts.[9]

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[9] Transcript of the Trial, page 162, reads:

"The Court: 'Tell me, what did you find out about entrapment where normally in entrapment they admit that they do the act, don't they.'

"Mr. Roth: 'Yes, I gave that some thought, if your honor please.'

"The Court: 'I should think you would give it a lot of thought because these people denied that they sold them.' . . .

"The Court: 'Motion for Judgment of Acquittal or in the Alternative Motion for a New Trial of the defendants Paul

The Court of Appeals conjectures that:

> "Probably the Trial Judge was of the opinion that there was no entrapment, as no evidence was pointed out to him as constituting entrapment by defendants' counsel except the bare 'phone call by Brown asking to buy narcotics. This evidence is insufficient to warrant consideration of, or if tried by a jury, submission of, the issue of entrapment."

We submit that the Government's evidence as advanced by both of the government witnesses, to the effect that the agent provocateur made the phone calls to the defendants, with the Treasury Agent monitoring the calls, was specifically to induce the defendants to produce the narcotics. This is enough to then put the Government in the position of having the burden to prove that the defendants had the predisposition to engage in the unlawful acts, before they were induced to do so by the Government's agent.

The question posed in this Petition has been presented to various Circuit Courts of Appeals, with various results.[10]

It now appears that if one is a defendant, charged with having made a sale of narcotics after solicitation and inducement by a special federal agent or a regular federal agent, the chances of being acquitted or convicted would

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Washington Kibby and Charles E. Stewart overruled in all particulars.'

"Mr. Martin: 'Your honor, I think he made the Motion also in the McFadden case.'

"Mr. Roth: 'Yes.'

"The Court: 'Do you want to argue that?'

"Mr. Roth: 'I'll submit it on the stipulation that the same arguments heretofore made for the other defendants may be considered as being made for McFadden.'

"The Court; 'The record may so show, and the renewed Motion for Acquittal or in the Alternative for a New Trial of Carl McFadden is overruled in all particulars.'"

[10] See the Court of Appeals Opinion (pages 34 and 35 in Appendix).

depend upon the geographical location of the court in which the case was tried, and whether the Trial Court would follow the rule as announced by one Circuit Court of Appeals or another Circuit, and depending on whether its own Circuit Court of Appeals has already taken a position in one camp or another.

This is highly undemocratic and unfair, if not unconstitutional, because it does not afford all defendants equal justice. The Supreme Court should take jurisdiction to answer this question in an authoritative manner, so that there will be equal justice throughout all the fifty States. It is well recognized that the issue of entrapment is most frequently raised in cases of alleged violations of the narcotic laws, and the liquor laws, and that a majority of the arrests and prosecutions follow some form of solicitation or undercover work by a special agent or part time employee of the government.

The Court should announce the rule in unequivocal terms, that a defendant need not admit the substantive acts charged, to have the Trial Court consider whether the Government's case establishes an issue of entrapment. The Trial Court should be required to pass on this question with a direct ruling or finding at the close of the Government's case when an appropriate motion is filed and the facts disclose solicitation by one "friend" to another, or by a known addict in the employ of the Government. The Government should then be permitted to show a pre-disposition by the defendant to commit the violation, when the defendant claims entrapment, whether the defendant admits or denies the substantive act.

> "Moreover it is settled that when the defense of entrapment is raised, evidence of prior conduct tending to show the defendant's predisposition to commit the offense charged is admissible." **Osborn v. United States, 87 S. Ct. 429, 433 (footnote) (1966).**

(2)

Is a defendant deprived of his constitutional right against self incrimination if (1) he must first admit in open court that he did the acts charged against him, or (2) give evidence against himself that he has committed the substantive acts charged, in order to advance a defense of "entrapment" to be submitted to a jury or to be considered by a judge where the trial is without a jury?

It appears to be self evident that after we recognize "entrapment" as a defense against a conviction, that to deprive any defendant of this defense is to deprive the defendant of the presumption of innocence. To require him to testify against himself that he committed the substantive acts in order to raise this defense is unconstitutional. It violates the constitutional guarantee against self-incrimination of the 5th Amendment to the Constitution of the United States of America.

> "No . . . person shall be compelled in any criminal case to be a witness against himself . . . nor be deprived of life, liberty, or property, without due process of law . . ." (Amendment V).

The question of how to avoid a dilemma of relying on the defense of entrapment, while denying the substantive act, is similar to the question decided by the Supreme Court in **Jones v. United States, 80 S. Ct. 725, 362 U. S. 256,** where the Court decided that the defendant did not have to admit possession of the narcotics to have standing to assert the right against unlawful search and seizure. To say that the defendants in such cases should not deny the substantive acts, or testify that they did the act, and then await the deliberation of the jury or of the court as to whether there was a sufficient amount of inducement or not enough inducement from the government agent to establish "entrapment" is to . . .

"contend that they should be denied the protection of the Fifth Amendment privilege intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishment for refusing to do so."

Albertson v. Subversive Activities Control Board, 86 S. Ct. 194, l. c. 197 (Nov. 15, 1965), 382 U. S. 70, 76.

To require the defendants to make the inculpatory admission that they did have possession of the contraband and did in fact transport it into the home of Brown, in order to advance the defense of entrapment would be the product of an "inducement" and thus would not be an act of free will. A confession or admission which is not the act of a defendant's free will is not admissible in any case. **Rogers v. Richmond, 365 U. S. 534, 81 S. Ct. 735, 739,** where the court said:

"(2, 3) Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i. e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system —a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. . . ."

CONCLUSION.

For all of the above reasons and grounds and to insure uniform interpretations and rules and principles of law applicable to all defendants in all the fifty states and

Federal Districts and to insure a fair impartial trial to these defendants and to others indicted or charged with violations of Sections 4704 and 4705 of Title 26, these defendants pray the Supreme Court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review their decision and opinion in these cases, and thus the defendants will ever pray.

Respectfully submitted,

HARRY ROTH,
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Clayton, Missouri 63105,
Attorney for Petitioners.

Judgment and Commitment.

United States District Court
For the
Eastern District of Missouri, Eastern Division.

United States of America
v.
Paul Washington Kibby.
} No. 66 Cr 58 (1).

On this 3rd day of June, 1966, came the attorney for the government and the defendant appeared in person and with Harry Roth, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, entered April 18, 1966, and a finding of guilty, entered by the Court on May 23, 1966, of the offenses of unlawfully purchasing from an unnamed person a certain narcotic drug which defendant purchased other than in or from the original stamped package containing the same; in violation of Sec. 4704 (a), T. 26, U. S. Code, as charged in each of Counts 1 and 3 of Indictment, and unlawfully selling to another, a certain narcotic drug, said sale having been made not in pursuance of a written order of the person to whom the said narcotic drug was sold; in violation of Section 4705 (a), T. 26, U. S. Code, as charged in each of Counts 3 and 4 of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of Ten (10) Years as to and under the charge contained in each of Counts 1 and 2 of Indictment, such terms to begin, run and terminate concurrently with each other, and Ten (10) Years as to and under the charge contained in each of Counts 3 and 4 of Indictment, such terms to begin, run and terminate concurrently with each other. It is further Ordered that concurrent term imposed under Counts 3 and 4 of Indictment herein shall begin and run consecutively and cumulatively and not concurrently to term of imprisonment imposed under Count 1 herein.

It Is Ordered that the amount of bond, pending appeal, is set at the sum of $25,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Roy W. Harper,
Roy W. Harper,
United States District Judge,
Harold G. Pryce,
Clerk.

A True Copy. Certified this 3rd day of June, 1966.

Harold G. Pryce,
Clerk,
(By) Ellen C. Donovan,
Deputy Clerk.

Judgment and Commitment.

United States District Court
For the
Eastern District of Missouri, Eastern Division.

United States of America
v.
Charles R. Stewart.
} No. 66 Cr 58 (1).

On this 3rd day of June, 1966, came the attorney for the government and the defendant appeared in person and with Harry Roth, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, entered April 18, 1966, and a finding of guilty, entered by the Court on May 23, 1966, of the offenses of unlawfully purchasing from an unnamed person a certain narcotic drug which defendant purchased other than in or from the original stamped package containing the same; in violation of Sec. 4704 (a), T. 26, U. S. Code, as charged in Count 5 of the Indictment, and unlawfully selling to another, a certain narcotic drug, said sale having been made not in pursuance of a written order of the person to whom the said narcotic drug was sold; in violation of Section 4705 (a), T. 26, U. S. Code, as charged in Count 6 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of Twenty (20) Years as to and under the charge contained in each of Counts 5 and 6 of Indictment to begin, run and terminate concurrently with each other.

It Is Ordered that the amount of bond, pending appeal, is set at the sum of $25,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Roy W. Harper,
Roy W. Harper,
United States District Judge,
Harold G. Pryce,
Clerk.

A True Copy. Certified this 3rd day of June, 1966.

(Signed) Harold G. Pryce,
Clerk,
(By) Ellen C. Donovan,
Deputy Clerk.

Judgment and Commitment.

(Filed June 3, 1966.)

United States District Court
For the Eastern District of Missouri,
Eastern Division.

United States of America
v. } No. 66Cr 61(1).
Carl McFadden.

On this 3rd day of June, 1966, came the attorney for the government and the defendant appeared in person and with Harry Roth, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, entered April 18, 1966, of the offenses of unlawfully selling to another a certain narcotic drug, said sale having been made not in pursuance of a written order of the person to whom the narcotic drug was sold; in violation of Section 4705(a) T. 26 U. S. Code, as charged in each of Counts 1 and 3 of Indictment; unlawfully purchasing from an unnamed person a certain narcotic drug other than in or from the original stamped package containing same; in violation of Section 4704(a) T. 26 U. S. Code, as charged in each of Counts 2 and 4 of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of Ten (10) Years as to and under the charge contained in each of Counts 1 & 2 of Indictment to begin, run and terminate concurrently with each other; Ten (10) Years as to and under the charge contained in each of Counts 3 and 4 to begin, run and terminate concurrently with each other. It is further Ordered that term of imprisonment imposed under Count 3 herein shall begin and run consecutively and cumulatively and not concurrently to term of imprisonment imposed under Count 1 herein.

It Is Ordered that the amount of bond, pending appeal, is fixed at the sum of $25,000.00.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roy W. Harper,
Roy W. Harper,
United States District Judge,
Harold G. Pryce,
Clerk,
(By) Ellen C. Donovan,
Deputy Clerk.

Judgment.

(Filed Feb. 20, 1967.)

United States Court of Appeals for the Eighth Circuit.

No. 18,446. September Term, 1966

Paul Washington Kibby,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Paul Washington Kibby, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

February 20, 1967.

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Judgment.

(Filed Feb. 20, 1967.)

United States Court of Appeals for the Eighth Circuit.

No. 18,446. September Term; 1966.

Charles R. Stewart,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Charles R. Stewart, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

February 20, 1967.

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

Judgment.

(Filed Feb. 20, 1967.)

United States Court of Appeals for the Eighth Circuit.

No. 18,446. September Term, 1966.

Carl McFadden,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Carl McFadden, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

February 20, 1967.

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit.

No. 18,445

Paul Washington Kibby, Appellant,

v.

United States of America, Appellee.

No. 18,446

Charles R. Stewart, Appellant,

v.

United States of America, Appellee.

No. 18,447

Carl McFadden, Appellant,

v.

United States of America, Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[February 20, 1967.]

Before Van Oosterhout, Gibson and Heaney, Circuit Judges.

Gibson, Circuit Judge.

Defendant-appellants Paul Washington Kibby, Charles R. Stewart and Carl McFadden (hereafter referred to as

defendants), were charged and convicted in the United States District Court for the Eastern District of Missouri, of illegal purchase[1] and sale of narcotics in violation of 26 U. S. C., §§ 4704 (a) and 4705 (a).[2] They duly appealed.

Defendants pleaded not guilty to their indictments and were tried without a jury before the Honorable Roy W. Harper. Kibby and Stewart were tried together and McFadden separately. The cases were consolidated for purposes of appeal and the evidence presented against each of the three defendants is essentially the same. It indicated that Dudley G. Brown, a Government informer and long time friend of the three defendants, telephoned each of the defendants, asking to purchase narcotics from them. Brown testified that McFadden came to his home on November 15, 1965 and January 27, 1966, and there sold him heroin. He testified that defendant Kibby sold him heroin on September 28, 1965 and December 1, 1965, and that defendant Stewart sold him heroin on March 22, 1966. The transactions were observed by Federal Bureau of Narcotics agent Richard M. Patch, who verified Brown's testimony. Each of the defendants testified, admitted being at Brown's residence on most of the dates in ques-

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[1] The counts charging illegal purchases are derivative of, and inferred from, the fact of appellants' unexplained possession.

[2] "§ 4704. Packages.

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

"§ 4705. Order forms.

(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

tion, but denied the sale of any narcotics. (Stewart didn't admit the March 22, 1966 date Tr. 124.)

Informer Brown had a record, was under a narcotics indictment in St. Louis, was a parolee from a theft conviction in California, and either was or had been a narcotics addict. The defense, of course, questioned his credibility. His credibility, however, was for the trier of fact, the Trial Judge, who accepted Brown's testimony with caution and apparently only gave credence to the testimony of Brown that was corroborated.[3]

In their final argument to the Court, defendants asserted their innocence. In addition, they stated that they were legally entitled to rely on the defense of entrapment without admitting the substantive act of selling the narcotics, and contend the Government had entrapped them by using an informer to telephone and ask for narcotics. The United States Attorney suggested to the Trial Court that the defendants must first admit the substantive act of selling the heroin before they can contend that the Government entrapped them. Further, the Government argued that from the facts of this case no entrapment has been shown.

The Trial Court made no separate finding on the two arguments, (1) that defendants did not do it, and (2) that if they did they were entrapped, but merely found

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[3] The Trial Judge remarked, in giving his decision:

"There isn't any question but what either the defendants or Mr. Brown was lying, one or the other had to lie, because one of them says one thing and the other one says another. Now, if that was the only testimony that we had, from the type of people involved, the court would have a real hard problem, but that isn't the problem with which the court is confronted here. We have the narcotic agent who witnessed the first three transactions, who furnished the money, who witnessed the transaction, saw it occur, * * * and, of course, under those circumstances we are not in the situation of having to rely entirely upon the testimony of Brown * * *" (Tr. 151-152).

defendants guilty as charged on certain specified counts.[4] The Trial Court did not rule that the defense of entrapment was not available, nor did it refuse any testimony offered by the defendants attempting to show entrapment, as the defendants, all of whom testified, denied that they committed the offenses and testified that though they knew Brown, they were at his home for purposes other than the selling of narcotics. They argue entrapment, therefore, solely on the Government's evidence. We are unable to determine from this general finding whether the Trial Court ruled as a matter of law that the defendants were not entitled to raise the defense of entrapment, or, as a matter of fact, decided that there was no entrapment. In passing, we note that the defense of entrapment might not be applicable to the charges of possession of narcotics under § 4704 (a), as this offense could have been committed prior to the contact being made by the Government Witness Brown.

In this appeal, defendants' sole argument is that they were legally entitled to rely upon the defense of entrapment without first admitting the substantive act charged. They have made a plausible argument and presented respectable authority for their position. *Hansford v. United States,* 303 F. 2d 219, 221 (D. C. Cir. 1962). "The defenses were alternative but not inconsisent." *Smith v. United States,* 331 F. 2d 784 (D. C. Cir. 1964); *Henderson v. United States,* 237 F. 2d 169, 173 (5 Cir. 1956). "The two de-

[4] Defendants Kibby and Stewart were also found not guilty on two counts charging additional illegal purchases and sales, because the District Attorney's office did not properly comply with the Court's order on a Bill of Particulars to furnish the place and the names of the parties involved in the possession and sale of narcotics. The Court originally found Kibby and Stewart guilty on counts 7 and 8, which alleged possession and sale at Kibby's home on April 1, 1966 (Tr. 152). But after the Assistant District Attorney said he did not tell counsel for Kibby and Stewart that the alleged offense occurred at Kibby's home but on the contrary had informed counsel that all sales occurred at Mr. Brown's house, the Court set aside the convictions and dismissed counts 7 and 8.

fenses (in this case) do not seem to us so repugnant that proof of one necessarily disproves the other." *Sears v. United States*, 343 F. 2d 139, 143 (5 Cir. 1965). "We do not think that it is impermissibly inconsistent for a defendant to deny the acts charged, yet urge * * * that the Government's own evidence establishes entrapment as a matter of law." However, we note that there is also considerable respectable authority which holds that such an inconsistent position may not be taken by a criminal defendant. *Ortiz v. United States*, 358 F. 2d 107, 108 (9 Cir. 1966), "(W)here defendant denies the commission of a crime, he is not entitled to the defense of entrapment * * *"; *Ortega v. United States*, 348 F. 2d 874, 876 (9 Cir. 1965), "(T)o utilize the entrapment defense, an accused must admit he committed acts which constitute a crime * * *"; *United States v. Georgiou*, 333 F. 2d 440, 441 (7 Cir. 1964), cert. denied 379 U. S. 901, "By invoking the defense of entrapment, defendant admits commission of the offense charged * * * See, *Ware v. United States*, 259 F. 2d 442, 445 (8 Cir. 1958).

While there might be some merit in the contention that the alternative defense of entrapment should be available to a defendant, without the defendant admitting his guilt, we do not intend at this time to make a full review of that issue. An extended review of the cases holding both ways on that issue could lead to the conclusion that entrapment should be available only when the acts constituting the commission of the crime charged are admitted. For different views or approaches to this probelm, see *Sylvia v. United States*, 312 F. 2d 145 (1 Cir. 1963) and *Gorin v. United States*, 313 F. 2d 641 (1 Cir. 1963). Although alternative and inconsistent defenses are permitted in civil trials, there might be cogent reasons why defenses, inconsistent in fact, should not be allowed in criminal proceedings. We do not believe, however, that it is necessary for us to make a substantive holding on this divided issue, because we believe that as a matter of law the facts of

this case cannot support defendants' contention that they were entrapped.

The earlier entrapment cases arose out of factual situations where the accused admitted the commission of the act but sought to excuse the commission because of the entrapment practices employed by the Government. Formerly, the Circuits were divided on whether entrapment actually constituted a defense. The Eighth Circuit, in *Butts v. United States,* 273 F. 35 (8 Cir. 1921) in an opinion by Judge Walter Sanborn, recognized the defense of entrapment, noting at page 38:

> "The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to or create crime for the sole purpose of prosecuting and punishing it. * * * (I)t is unconscionable, contrary to public policy * * *."

The Supreme Court granted certiorari to resolve the conflict in the Circuits. Chief Justice Hughes, in *Sorrells v. United States,* 287 U. S. 435 (1932), approved the *Butts* opinion, citing it as a leading case, recognized the defense of entrapment, held that it may be raised under a general plea of not guilty, based the defense on considerations of general public policy, and further held if evidence of entrapment was presented it was a factual issue to be decided by the jury, unless the evidence as a matter of law established entrapment. The strong concurring opinion of Mr. Justice Roberts, joined by Mr. Justice Brandeis and Mr. Justice Stone, viewed entrapment as a legal issue:

> "* * * based on the inherent right of the Court not to be made the instrument of wrong (and placed their doctrine) on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belong only to the Court. It is the province of the Court and the Court alone to protect itself and the Government from such

prostitution of the criminal law." Page 457 of 287 U. S.

The Supreme Court again, in *Sherman v. United States,* 356 U. S. 369 (1958), in an opinion by Chief Justice Warren, reaffirmed the majority view in *Sorrells,* and held that entrapment, unless it can be decided as a matter of law, is a factual issue for the jury. A strong concurring opinion of Mr. Justice Frankfurter, joined by Justices Douglas, Harlan and Brennan, adopted Mr. Justice Roberts' views in *Sorrells,* that entrapment is a matter for the Court alone to decide, for the "preservation of the purity of its own temple." 385 of 356 U. S. We are bound by the majority opinion in *Sorrells* and *Sherman,* and must view the issue as one of fact, unless, of course, as a matter of law no factual issue is presented.

Probably the Trial Judge was of the opinion that there was no entrapment, as no evidence was pointed out to him as constituting entrapment by defendants' counsel except the bare 'phone call by Brown asking to buy narcotics. This evidence is insufficient to warrant consideration of, or, if tried by a jury, submission of, the issue of entrapment.

In order to effectively combat the market in contraband goods such as narcotics, untaxed liquor, certain game birds, etc. it is a common police practice for officers or undercover agents to pose as potential buyers of the illegal merchandise. When the Government agent or informer does nothing more than request that the merchandise be sold to him, the courts have repeatedly held that the defendant has not made a submissible case on the issue of entrapment.[5] In other words, as a matter of law, no

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[5] Of course, if the informer does more, such as offer the defendant substantial financial reward, feigns severe illness or repeatedly cajoles or implores the defendant to violate the law, a factual issue of entrapment may then be presented. See, *Carson v. United*

entrapment takes place merely by a Government informer's asking to purchase contraband articles.[6] *United States v. Ball,* 344 F. 2d 925 (6 Cir., 1965), cert. denied 382 U. S. 907; *Brainin v. United States,* 314 F. 2d 460 (5 Cir. 1963); *Hester v. United States,* 303 F. 2d 47 (10 Cir. 1962), cert. denied 371 U. S. 847; *United States v. Lile,* 290 F. 2d 225 (6 Cir. 1961); *United States v. Place,* 263 F. 2d 627 (2 Cir. 1959), cert. denied 360 U. S. 919; *Rodriguez v. United States,* 227 F. 2d 912 (5 Cir. 1955); *United States v. Markham,* 191 F. 2d 936 (7 Cir. 1951).

These cases clearly indicate that there was no issue of entrapment before the Trial Court. Defendants presented no evidence of entrapment and, in fact, testified that they neither purchased nor sold narcotics. The Government's evidence only shows that Government informer Brown telephoned the defendants, asking to buy narcotics. From the evidence, he did nothing more, for apparently defendants were willing sellers. In response to Brown's approach, each defendant came to Brown's residence and sold the requested narcotics. On facts very similar to these, the Supreme Court, in *Lewis v. United States,* ... U. S. ... (December 12, 1966), commented, "Petitioner does not argue that he was entrapped, as he could not on the facts of this case."

In *Sherman v. United States,* 356 U. S. 369, 372 (1958), the Supreme Court stated:

> "Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police

States, 310 F. 2d 558 (9 Cir. 1962); *Hamilton v. United States,* 221 F. 2d 611 (5 Cir. 1955); *United States v. Sawyer,* 210 F. 2d 169 (3 Cir. 1954); *State v. Taylor,* 375 S. W. 2d 58 (Mo. 1964).

[6] However, in jury trials, as a matter of practice and "out of an abundance of caution" many trial courts prefer not to rule as a matter of law against a defendant on this issue, and even the faintest indication of entrapment will bring forth an instruction. See *Rowell v. United States,* 368 F. 2d 957 (8 Cir.). A submission, therefore, does not necessarily mean that a submissible case has, in fact, been made.

> officer. * * * However, the fact that government agents 'merely afford opportunities and facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law enforcement officials."

As Government informer Brown did no more than inform the defendants that he was a willing buyer, in the words of the Supreme Court he was merely affording an opportunity and facility for the commission of the offense. The criminal conduct in this case was clearly the creative activity of the defendants and not of the law enforcement officers. Defendants were not lured by repeated and persistent solicitation, as in *Sorrells,* nor were they innocent parties, beguiled into committing crimes that they would otherwise not have considered, as in *Sherman.* The evidence strongly indicates that defendants were in the business of purveying narcotics, possessed narcotics and were ready to sell to anyone when they thought they could do so with impunity. The Government merely provided a stage upon which the offenders were free to act if they were so inclined. Once having performed, they are not to be heard to argue that they were entrapped.

It is, therefore, immaterial whether the Trial Judge viewed the defense of entrapment as not being available, or the evidence as not sustaining the defense of entrapment, because there is no evidence on the record to indicate or in any way support appellants' contentions that they were entrapped.

As there is more than sufficient evidence to support the convictions and no other errors are alleged or appear, the Trial Court's judgments of conviction are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Supreme Court of the United States.

No. ....., October Term, 1966.

Paul Washington Kibby, Charles R. Stewart and Carl McFadden,
Petitioners,

vs.

United States.

Order Extending Time to File Petition for Writ of Certiorari.

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 21, 1967.

S/ Byron R. White,
Associate Justice of the Supreme Court of the United States.

Dated this 16th day of March, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1310

PAUL WASHINGTON KIBBY, CHARLES R. STEWART and CARL MCFADDEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted by the court, sitting without a jury in the United States District Court for the Eastern District of Missouri, for illegal purchase and sale of narcotics, in violation of 26 U.S.C. 4704(a) and 4705(a) (R. I, 1–4; R. II, 152–154). Each was sentenced to imprisonment for a period of twenty years (R. I, 23–24; R. II, 169–170; Pet. App. 21–26). The court of appeals unanimously affirmed the convictions, finding that it was not necessary to decide whether petitioners were entitled to rely upon the defense of entrapment, while, at the same time, denying the substantive acts charged (which was their sole contention on appeal), because the facts of this

261-733—67

case, as a matter of law, did not in any event show entrapment. (Pet. App. 30–38; R. III, 1–10).

The evidence at the trial of petitioners Kibby and Stewart (which is also illustrative of the evidence against petitioner McFadden)[1] conclusively demonstrates that entrapment was not an issue in this case. It shows that one Dudley G. Brown, a government informer and long-time acquaintance of Kibby and Stewart, made arrangements by telephone to have those two petitioners (on various occasions) sell narcotics to him. Pursuant to these arrangements, petitioners would deliver the narcotics to Brown's home and pick up marked money furnished by the Federal Bureau of Narcotics (R. II, 10–30, 35–38, 42, 49–58). No inducement was offered beyond making available a willing buyer with sufficient funds to make the purchase. A narcotics agent was hidden on the premises at the time of each transfer and verified in detail the informant's testimony (R. II, 59–68, 70–87). Each petitioner testified and denied making any sales of narcotics to Brown at any time (R. II, 114–125, 133–139).

It is, of course, a common practice for a government agent or informer to pose as a potential buyer of illegal goods, such as narcotics. Indeed, in such cases it "is all but impossible to obtain evidence for prosecution save by the use of decoys," *Lewis* v. *United*

[1] Petitioners Kibby and Stewart were tried together and McFadden separately. The certified record filed with this Court includes only the transcript of the Kibby-Stewart trial. Since all petitioners concede that the "evidence presented against the three defendants was essentially the same" (Pet. 7), reference to the record will be illustrative of all three cases.

States, 385 U.S. 206, 210, n. 6. When, as here, the government informer merely makes it known that he is an available buyer of the illegal goods, it is well established that, as a matter of law, no entrapment takes place when the defendant fills the order. See, *e.g., United States* v. *Ball,* 344 F. 2d 925 (C.A. 6), certiorari denied, 382 U.S. 907; *Brainin* v. *United States,* 314 F. 2d 460 (C.A. 5); *Hester* v. *United States,* 303 F. 2d 47 (C.A. 10), certiorari denied, 371 U.S. 847; *United States* v. *Place,* 263 F. 2d 627 (C.A. 2), certiorari denied, 360 U.S. 920. The court of appeals properly so held in the instant case.

Petitioners err in asserting that the court of appeals decided that the defense of entrapment was not available unless the substantive acts charged were admitted (Pet. 10–11). The court below noted the conflicting authority on that point but concluded that it was unnecessary to resolve the issue in this case (Pet. App. 33–35). Nor did the trial court rule that inconsistent defenses were not available; it overruled generally motions which asserted entrapment as a defense. The government called the inconsistency of the defenses to the attention of the court but also indicated that the evidence was wholly insufficient to raise the issue of entrapment (R. II, 150–151). The trial court would hardly have made a general ruling if it considered the record as remotely supporting the defense of entrapment, particularly since the verdict of guilty necessarily implies that the court rejected petitioners' specific denials of the acts charged.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967